No. 84-676

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK E. BARNETT,

Petitioner,

v.

UNITED AIR LINES, INC., AND
ASSOCIATION OF FLIGHT ATTENDANTS,

Respondents.

IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF UNITED AIR LINES, INC.

ROBERT H. BROWN
Counsel of Record
P. O. Box 66100
Chicago, IL 60666
312/952-5096
Attorney for Respondent,
UNITED AIR LINES, INC.

Pandick Midwest, Inc., Chicago • (312) 454-7600

14 pp

QUESTIONS PRESENTED

1. Whether *Del Costello* v. *International Brotherhood of Teamsters*, ____ U.S. ____, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) applies retroactively?

2. Whether the six month statute of limitations for unfair labor practices found at 29 U.S.C. § 160(b) should apply to hybrid breach of contract/duty of fair representation cases brought by employees covered by the Railway Labor Act. (45 U.S.C. § 151 *et seq.*) as it applies to employees covered by the Labor Management Relations Act (29 U.S.C. § 141 *et seq.*)?

3. Whether it is appropriate for this Court to review the meaning of the term "accrual" under 45 U.S.C. § 153 (First (r))?

PARTIES TO THE PROCEEDINGS

(a) Plaintiff-Petitioner Frank Barnett until his resignation in July, 1984 was employed by United Air Lines, Inc. as a flight attendant. He was appellant below.

(b) Respondent-Defendant United Air Lines, Inc. (hereinafter referred to as "United") is a Delaware corporation with its principal place of business at 1200 East Algonquin Road, Elk Grove Township, Illinois. It is a wholly owned subsidiary of UAL, Inc., a Delaware corporation, with its principal place of business at the same address. It was appellee below.

(c) Respondent-Defendant Association of Flight Attendants (hereinafter referred to as "AFA") is, and at all pertinent times has been, the collective bargaining agent for United's flight attendants. It was appellee below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK E. BARNETT,

Petitioner,

v.

UNITED AIR LINES, INC., AND
ASSOCIATION OF FLIGHT ATTENDANTS,

Respondents.

IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF UNITED AIR LINES, INC.

United Air Lines, Inc. opposes Petitioner Frank E. Barnett's Petition for Certiorari to the United States Court of Appeals for the Tenth Circuit.

JURISDICTION

This case arises under federal law. (See the Railway Labor Act, 45 U.S.C. § 151 *et seq.*) Petitioner's second Petition for Rehearing was denied July 10, 1984. He filed the instant Petition on October 9, 1984. United received a copy of said Petition on October 12, 1984.

STATEMENT OF MATERIAL FACTS

Petitioner, a United flight attendant, was temporarily employed as an inflight services supervisor. Following his temporary duty he returned to his former job of flight attendant. Flight attendants are covered by a collective bargaining agreement between United and respondent Association of Flight Attendants. (Hereinafter referred to as "AFA") Upon his return to the flight attendant job, United adjusted his seniority in such a way that he lost approximately nine months flight attendant seniority credit. He initiated grievance and arbitration procedures pursuant to the collective bargaining agreement. United claimed the seniority adjustment was required by the collective bargaining agreement. On September 7, 1978, the United/AFA System Board of Adjustment upheld United's position and denied petitioner's grievance. Petitioner was first notified of the System Board decision by letter dated October 13, 1978, "which was received several days later." (Amended Complaint) Petitioner's lawsuit was filed October 14, 1980. It alleges that United breached the collective bargaining agreement in adjusting his seniority and that the union did not fairly represent him.

REASONS WHY THIS CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

1. There Is No Conflict In The Circuits That *Del Costello* Should Be Applied Retroactively

This Court's decision in *Del Costello, supra,* borrowed the six month statute of limitations found at 29 U.S.C. § 160(b), for hybrid breach of contract/duty of fair representation cases such as this one. Petitioner asserts that his Petition should be granted because of a purported post-*Del Costello* conflict in the circuits on its retroactivity. However, every Court of Appeals that has considered the matter, except the Ninth, has unam-

biguously found that *Del Costello* should be given retroactive effect.[1] Indeed, *Del Costello* itself does not hint that this should not be the case.

Only the Ninth Circuit refuses to apply *Del Costello* retroactively. *Barina* v. *Gulf-Trading and Transportation Co.*, 726 F.2d 560 (9th Cir. 1984). See also *Singer* v. *Flying Tiger Lines*, 652 F.2d 1349 (9th Cir. 1981). The Ninth Circuit in large part bases this refusal on the first criterion for retroactive application of law stated in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106, 92 S.Ct. 349, 30 L.Ed. 296 (1971). That criterion basically states that under some circumstances a decision will not be given retroactive effect if it establishes a new principle of law, overrules clear past precedent, and was not clearly foreshadowed. The Ninth Circuit refused to retroactively apply *Del Costello* because in *Price* v. *Southern Pacific Transportation Co.*, 586 F.2d 750, 752-759 (9th Cir. 1984) it had ruled that breach of contract/duty of fair representation cases in California were governed by a four year statute of limitations. See *Singer* v. *Flying Tiger Lines, supra* at 1357. It found that in view of this "clear precedent," it would be unfair to apply retroactively *Del Costello*, or its predecessor *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed. 732 (1981).

Thus, the Ninth Circuit does not really conflict with other circuits on this issue. Furthermore, petitioner has not pointed to

---

[1] *Graves* v. *Smith's Transfer Corp.*, 736 F.2d 819 (1st Cir. 1984); *Welyczko* v. *U.S. Air Inc.*, 733 F.2d 239 (2d Cir. 1984); *Perez* v. *Dana Corp.*, 718 F.2d 581 (3rd Cir. 1983); *Murray* v. *Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983); *Edwards* v. *Sea-Land Service Inc.*, 720 F.2d 857 (5th Cir. 1983); *Storck* v. *International Association of Teamsters, Local No. 600*, 712 F.2d 1194 (7th Cir. 1983); *Lincoln* v. *District 9 of the International Association of Machinists and Aerospace Workers*, 723 F.2d 627 (8th Cir. 1983); *Hand* v. *International Chemical Workers Union*, 712 F.2d 1350 (11th Cir. 1983).

precedent like *Price* in the Tenth or any other circuit. To the extent one might conclude a conflict does exist, the Ninth Circuit position has correctly been disregarded by the other circuits. Thus, petitioner here just has not shown sufficient reasons for *certiorari* to be granted on the retroactively issue. Furthermore, *certiorari* should not be granted since a decision by this Court in late 1985 or 1986, as would be expected, would impact few pending cases and fewer still cases not yet brought. This is true since *UPS* v. *Mitchell, supra,* which approved short statutes of limitations as to employer-defendants in most states was decided in 1981 and *Del Costello* was decided in mid-1983.

2. There Is No Conflict In The Circuits That 29 U.S.C. § 160(b) As Discussed In *Del Costello* Should Be Applied To Cases Involving Employees Covered By The Railway Labor Act

Four Circuit Courts of Appeals in addition to the Tenth Circuit have considered whether *Del Costello* requires that hybrid breach of contract/duty of fair representation cases should be regulated by the six month statute of limitations contained in 29 U.S.C. 160(b).[2] All have decided that it should be. Furthermore, though numerous district courts have decided the issue, counsel has found only one district court decision that has held to the contrary.[3]

Furthermore, as in the instant matter, there is good reason that *Del Costello* should be applied to Railway Labor Act cases. The hybrid Railway Labor Act case is virtually identical to the hybrid case arising under § 301 of the National Labor Rela-

---

[2] *Linder* v. *Berge,* 739 F.2d 686 (1st Cir. 1984); *Welyczko* v. *U.S. Air,* 733 F.2d 239 (2d Cir. 1984) *Sisco* v. *Consolidated Rail Corporation,* 732 F.2d 1188 (3rd Cir. 1984); *Barina* v. *Gulf-Trading & Transport Co., supra.*

[3] That decision relied upon the *Barnett* opinion withdrawn by the Tenth Circuit. *Henry* v. *Airline Pilots Association,* 585 F.Supp. 376 (N.D. Georgia 1984).

tions Act (29 U.S.C. 185).[4] This Court in *Del Costello* in part applied § 10(b) because of the policies of balancing the national need for finality of collective bargaining settlements with the employee's interest in setting aside unjust settlements. *United Parcel Service* v. *Mitchell, supra,* at 70-71. (Justice Stewart concurring). See *Del Costello, supra* 103 S.Ct. at 2294. This Court held these important policies were promoted by uniform national procedures and limitations that quickly resolved disputes yet allowed employees sufficient time to act. *Del Costello, supra* at 2292, 2294. Those policies are identical in the Railway Labor Act context.

Petitioner's suggestion that conflicts will arise over application of § 10(b) to hybrid cases involving employees covered by the RLA is simply speculation with no logical support. Any court which applies the unequivocal findings of *Del Costello* will apply § 10(b). This is because, if for no other reason, the Court found that hybrid cases *are not* analogous to actions to vacate arbitration awards. Therefore, the two year limitations period in the RLA (45 U.S.C. § 153 (First (r)) applicable to actions to vacate arbitration awards concerning railroad employees only[5] offers a limitations period markedly inferior to § 10(b) of the NLRA.

Therefore, in view of the lack of ambiguity in *Del Costello* and the consistent application to date of that case by the lower courts, further review by this Court would serve no purpose.

---

[4] Indeed the duty of fair representation doctrine is a judicially created doctrine which originated under the Railway Labor Act. *Steele* v. *Louisville & Nashville Rail Co.,* 323 U.S. 192, 65 S.Ct. 226 (1944) and later was applied to cases arising under the NLRA. *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 73 S.Ct. 681 (1953).

[5] § 153 is specifically inapplicable to airline employees in any event. 45 U.S.C. § 181.

3. This Court Need Not Consider Whether Petitioner Filed His Suit Within Two Years Of "Accrual" As Used in 45 U.S.C. § 153 (First (r))

In the first *Barnett* opinion withdrawn by the Tenth Circuit, the Court found that petitioner has not filed his suit within two years of "accrual" under 45 U.S.C. § 153 (First (r)). The issue was not ruled upon in the second *Barnett* opinion for which petitioner here seeks review. Therefore, the issue is not properly before this Court now.

CONCLUSION

For the foregoing reasons the Tenth Circuit properly and consistently applied a six month statute of limitations as required by *Del Costello, supra.* The writ of *certiorari* should not be granted.

Respectfully submitted,

ROBERT H. BROWN
Counsel of Record
Attorney for Respondent,
UNITED AIR LINES, INC.